UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE:

PAYROLL MANAGEMENT, INC., CASE NO.: 18-30298-KKS
CHAPTER: 11

Debtor.
_____/

SUNZ INSURANCE COMPANY, ADV. NO.: 19-03005-KKS

Plaintiff,

v.

PAYROLL MANAGEMENT, INC., et al.,

Defendants.
_____/

ORDER DENYING *PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT* (DOC. 74) AND GRANTING DEFENDANT IRS' CROSS-MOTION FOR SUMMARY JUDGMENT (DOC. 105)

THIS MATTER is before the Court on cross-motions for summary judgment filed by Plaintiff, Sunz Insurance Co. ("Sunz") and Defendant, United States Internal Revenue Service ("IRS").[1] Before the Court is the

[1] *Plaintiff's Motion for Summary Judgment*, Doc. 74 ("Summary Judgment Motion"); *United States' Response to Plaintiff's Motion for Summary Judgment and United States' Cross-Motion for Summary Judgment*, Doc. 105 ("Cross-Motion for Summary Judgment"). Parties have also filed various responses and supplement briefs. *Plaintiff's Response to United States' Cross-Motion*, Doc. 131; *United States' Reply in Support of Its Cross-Motion for Summary Judgment*, Doc. 140; *Notice of Additional Authority*, Doc. 141; *Plaintiff's Supplemental Brief in Support of Motion for Summary Judgment,* Doc. 152; *United States' Response to Plaintiff's Brief*, Doc. 159.

priority of the claims of Sunz, a contractual creditor, and the IRS, a tax lien creditor, to over $1 million in economic damages from the Deepwater Horizon Oil Spill disaster of 2010 that Debtor received post-petition. The issues presented would make an excellent, but difficult, secured transactions final exam.

Having reviewed the pleadings, volumes of case law, some cited by the parties and more the Court researched on its own, statutes and treatises, the Court finds that Sunz does not have a security interest in the BP Claim and the IRS is entitled to summary judgment in its favor.

UNDISPUTED MATERIAL FACTS

History of Debtor's BP Claim

In April 2010, an explosion on an offshore oil drilling rig, the *Deepwater Horizon*, resulted in the deaths of eleven (11) workers and caused the largest offshore oil spill in U.S. history, resulting in 134 million gallons of oil being released into the Gulf of Mexico over eighty-seven (87) days, "fouling 1,300 miles of shoreline along five states" ("Deepwater Horizon Oil Spill").[2]

[2] *Deepwater Horizon: Effect on Marine Mammals and Sea Turtles*, Nat'l Ocean Serv., https://oceanservice.noaa.gov/news/apr17/dwh-protected-species.html (last visited Mar. 11, 2021); *Deepwater Horizon – BP Gulf of Mexico Oil Spill*, U.S. Env't Prot. Agency,

Damages caused by the Deepwater Horizon Oil Spill gave rise to numerous lawsuits against a variety of entities, including British Petroleum Exploration & Production, Inc. (collectively "BP Parties"), that were consolidated in front of the United States District Court for the Eastern District of Louisiana.[3] On December 21, 2012, that court certified the "Economic Class" and approved the *Economic and Property Damages Settlement Agreement* ("BP Settlement Agreement").[4] The BP Settlement Agreement implemented a court supervised settlement program through which a claims administrator would review and process proper and timely claims for economic damages resulting from the Deepwater Horizon Oil Spill.[5]

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https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill (last updated Dec. 4, 2020).

[3] The Court takes judicial notice of documents filed in *In re Oil Spill by the Oil Rig, "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010*, No. 2:10-md-02179-CJB-SS (E.D. La. 2010), which Sunz attached as Exs. A, C, & D. *See* Fed. R. Evid. 201; *Bryant v. Ford,* 967 F.3d 1272, 1275 (11th Cir. 2020) (quoting Fed. R. Evid. 201(b)).

[4] A copy of the approved BP Settlement Agreement is attached to the *Notice of Filing Corrected Exhibit D to Plaintiff's Motion for Summary Judgment*, Doc. 77, Ex. D. The district court's "Order and Reasons" for granting final approval of the BP Settlement Agreement are set forth in *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010*, 910 F. Supp. 2d 891 (E.D. La. 2012). In the Order and Reasons, the court stated that it would issue a separate "Order and Judgment," which it did. *Id.* at 964; *see Order and Judgment Granting Final Approval of Economic and Property Damages Settlement and Confirming Certification of the Economic and Property Damages Settlement Class*, Doc. 74, Ex. C.

[5] *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010*, 910 F. Supp. 2d at 905. BP appealed the class certification and BP Settlement Agreement, both of which were affirmed on interlocutory appeal on January 10, 2014, by the Fifth Circuit Court of Appeals. *Id., aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), *cert. denied sub nom. BP Expl. & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 574 U.S. 1054 (2014).

Some time prior to April 19, 2012, Debtor, Payroll Management, Inc. ("Debtor"), retained counsel and submitted one or more economic damage claims to the entity then coordinating claims, the Gulf Coast Claims Facility ("GCCF").[6] On April 19, 2012, the GCCF notified Debtor in writing that it qualified for compensation and issued Debtor a check for $743,712.16, representing its "past losses" for the period after April 20, 2010 and through the last period for which Debtor submitted records showing its income or losses.[7] In September 2012, Debtor submitted two additional forms, this time to the entity formed to take over handling of economic damage claims, the Deepwater Horizon Claims Center ("DHCC"), in further support of its economic damages claim (inclusive of all claim forms Debtor submitted, the "BP Claim").[8]

The record in this adversary proceeding is devoid of specific information as to what, if any, action was taken on account of the BP Claim

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[6] The GCCF began processing and paying claims before a court supervised settlement program was established. The BP Parties established the GCCF in order to comply with the Oil Pollution Act. *In re Deepwater Horizon*, 739 F.3d at 796.

[7] *Determination of Interim Payment*, Doc. 74, Ex. B. The check included $24,390.00 for accounting preparation expenses. *Id.* at 3. The GCCF determined Debtor's "Total Post-Spill Lost Profits," was for $719,322.16. *Id.*

[8] *Deepwater Horizon Economic and Property Settlement Registration Form,* Doc. 74, Ex. E *Business Economic Loss Claim (Purple Form)*, Doc. 74, Ex. F. "BP Claim" in this Order is synonymous with a prior order in which the Court used the term "BP Claims." *See Order Requiring Further Briefing on Plaintiff's Motion for Summary Judgment (Doc. 74) and United States' Response to Plaintiff's Motion for Summary Judgment and United States' Cross Motion for Summary Judgment (Doc. 105)*, Doc. 142 ("Order Requiring Further Briefing").

between September of 2012 and early in 2017. The law firm that was handling the BP Claim, Harrison Sale McCloy Chartered, et. al., represents that in February of 2017 it had "obtained a substantial settlement proposal," but before the deadline to accept or reject the proposal expired Debtor terminated the firm's services.[9]

At some point Debtor requested reconsideration of the original amount it was awarded by the DHCC in April of 2012. In response, on December 19, 2017, the DHCC sent written notification that Debtor qualified for $1,070,330.23, net of the Interim Payment of $719,322.16 made in 2012.[10]

Procedural History Relevant to the BP Claim

Debtor filed its Chapter 11 petition on March 27, 2018.[11] On August 16, 2018, the DHCC issued a notice stating that it had previously requested, but had not received, documentation from Debtor that the BP Claim proceeds are not property of the bankruptcy estate or a court order

[9] *Harrison Sale McCloy Chartered, et al., Proof of Claim* at 4, *In re Payroll Mgmt., Inc.*, No. 18-30298-KKS (Bankr. N.D. Fla. Nov. 20, 2018), Proof of Claim 42-2.
[10] *Post-Reconsideration Eligibility Notice,* Doc. 74, Ex. G. This notice listed Debtor's counsel as "Greer Law Firm." *Id.*
[11] *Chapter 11 Voluntary Petition*, *In re Payroll Mgmt., Inc.*, No. 18-30298-KKS (Bankr. N.D. Fla. Mar. 27, 2018), Doc. 1.

approving the monetary award.[12] The DHCC notice, copied to the U.S. Trustee, set forth a response deadline of October 15, 2018 and stated "**[i]f we do not receive the documents identified in Section IV below on or before October 15, 2018, we will close the claim without payment.**"[13]

The day after the stated deadline, October 16, 2018, Debtor filed a notice in its Chapter 11 case that it had executed a "Settlement Agreement" with the DHCC.[14] The document attached to that notice includes a "*Full and Final Release, Settlement and Covenant Not to Sue*" signed by a representative of Debtor on August 14, 2018 ("Release").[15] Also on October 16, 2018, Debtor filed and served a motion via negative notice requesting this Court to approve a settlement of the BP Claim for $1,070,330.23.[16] After no objections were filed, this Court approved that settlement by order dated November 13, 2018.[17] On November 26, 2018, Debtor received a

[12] *Notice of Payable Claim for Debtor Claimant with Open Bankruptcy,* Doc. 74, Ex. H, at 1. Nothing in the record shows when DHCC sent its original request for this information to the Debtor.
[13] *Id.* (emphasis in original).
[14] *Notice of Filing Settlement Agreement with the Deepwater Horizon Claims Center*, *In re Payroll Mgmt., Inc.*, No. 18-30298-KKS (Bankr. N.D. Fla. Oct. 16, 2018), Doc. 95.
[15] *Id.* at 4. No explanation has been offered as to why the Release is dated August 14, 2018 but was not filed with the Court until October.
[16] *Motion to Approve Settlement Agreement with Deepwater Horizon Claims Center*, *In re Payroll Mgmt., Inc.*, No. 18-30298-KKS (Bankr. N.D. Fla. Oct. 16, 2018), Doc. 96.
[17] *Order Granting Motion to Approve Settlement Agreement with the Deepwater Horizon Claims Center*, *In re Payroll Mgmt., Inc.*, No. 18-30298-KKS (Bankr. N.D. Fla. Nov. 13, 2018), Doc. 107.

check from the DHCC in the amount of $1,070,330.23, which is being held in trust pending further order of this Court.[18]

The Competing Claims of Sunz and the IRS

Sunz claims a prior, perfected security interest in the BP Claim based on a business relationship that began in 2015 when Sunz issued Debtor a large workers' compensation insurance policy and financed the premiums. In September or October of 2015, Sunz and Debtor executed a document entitled "*Sunz Large Deductible Program Agreement*" ("Program Agreement").[19] On or about October 23, 2015, Debtor, two other parties and Sunz executed a *Pledge and Security Agreement* ("Security Agreement") to secure payment and performance of the Program Agreement.[20] The Security Agreement defines the "Collateral" as follows:

> **A. Business Assets of Pledgors.** All right, title, and interest of Pledgors in and to, but none of the obligations under or with

[18] *Notice of Payment*, Doc. 74, Ex. I.

[19] The date the Program Agreement was executed is unclear; the facts surrounding its execution are confusing. The Declaration in support of Sunz' Motion for Summary Judgment states the Program Agreement was executed September 15, 2015. *Declaration of Kenneth Blake Souers in Support of Plaintiff's Motion for Summary Judgment*, Doc. 74, Ex. J ¶ 5 ("Sunz' Declaration"). The copy of the Program Agreement attached to that Declaration is undated. Program Agreement, Doc. 74, Ex. J-1, at 5–9. The "*Pledge and Security Agreement*," which by its own terms has an effective date of November 1, 2015, refers to a Program Agreement dated October 21, 2015. *Pledge and Security Agreement*, Doc. 74, Ex. J-2, at 12. It is therefore unclear whether there was only one Program Agreement, or whether there may have been more than one. In any event, SUNZ Insurance Solutions, LLC is also a party to the Program Agreement filed with the Court.

[20] Payroll Management Inc. of Delaware ("Payroll Delaware") and PMI Staffing, Inc. ("PMI"), are also parties to the Security Agreement. They, along with Debtor, are the "Pledgors" under the Security Agreement, Doc. 74, Ex. J-2, at 12–19.

> respect to, the assets of the business of Pledgors; . . . . Except as otherwise provided herein, assets shall include, but not be limited to, all tangible and intangible property which is or may be used in the business of Pledgors; the customer lists, including renewal policy information, related records and compilations of information; the identity, lists or descriptions of any new or potential customers, referral sources or organizations; marketing programs; financial information; contract proposals or bidding information; business plans; training and operations methods and manuals; software programs; reports; premium structures; existing contracts and policies;
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> **B. Proceeds.** All additions, substitutes and replacements for and proceeds of the above Collateral (including all income and benefits resulting from any of the above, ...[21]

On November 3, 2015, Sunz recorded a UCC-1 Financing Statement ("UCC-1") containing the same collateral description.[22] Neither the Security Agreement, the Program Agreement, nor the UCC-1 executed by Debtor mention the BP Claim or any claim in relation to the Deepwater Horizon Oil Spill.

In March of 2017, Debtor defaulted under the Program Agreement.[23] The same month, the IRS filed a "*Notice of Federal Tax Lien*" against Debtor for $23,186,065.93 in unpaid 941 taxes for the fourth quarter of

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[21] *Id.* at 13. Debtor, Payroll Delaware, and PMI are the "Pledgors" named in Security Agreement.

[22] *State of Florida Uniform Commercial Code Financing Statement Form*, Doc. 74, Ex. J-3, at 22–23.

[23] Sunz' Declaration, Doc. 74, Ex. J ¶ 10.

2012 through the third quarter of 2016.[24] On August 1, 2017, the IRS filed a second "*Notice of Federal Tax Lien*" against Debtor for an additional $3,673,031.28 in unpaid 940 taxes for 2016 and 941 taxes for the first quarter of 2017.[25]

Procedural History of this Adversary Proceeding

Sunz filed its initial Complaint on April 29 and its Amended Complaint on June 20, 2019, naming numerous entities, including the IRS, and seeking (1) a declaratory judgment that it holds a "valid, duly perfected, first priority security interest" in the BP Claim, and (2) turnover of the BP Claim proceeds.[26] In August of 2019 the Court authorized the parties to attend global mediation.[27] The parties did not file a report of the outcome of mediation. Various defendants filed Answers and Sunz filed its Summary Judgment Motion on June 12, 2020.[28]

On August 26, 2020, the Court entered an order submitted by Debtor and agreed to by Sunz and the IRS limiting the scope of Sunz' Summary Judgment Motion as follows:

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[24] *Notice of Federal Tax Lien*, Doc. 74, Ex. O, at 1.
[25] *Id.* at 2.
[26] *Adversary Complaint*, Doc. 1; *Amended Adversary Complaint*, Doc. 22.
[27] *Order Settling Global Mediation*, Doc. 45.
[28] Summary Judgment Motion, Doc. 74.

> The scope of the Summary Judgment Motion filed by Sunz Insurance Company . . . shall be limited to the narrow legal question of the interpretation of the collateral descriptions set forth in the UCC-1 Financing Statement recorded by Sunz Insurance Company . . . and the language and scope of the tax liens of the Internal Revenue Service . . . to determine which should prevail as against the other in priority, based solely on their respective language and applicable law . . . .[29]

Sunz and the IRS briefed the issues pertaining to the Summary Judgment Motion, as limited by the Agreed Order. Meanwhile, in February of 2021 the Court entered an order approving settlement of this action with certain Defendants and a judgment in favor of Sunz against others.[30] That left Sunz and the IRS as the only remaining creditors battling over the BP Claim.

After reviewing Sunz' and the IRS' pleadings addressing perfection and Sunz' UCC-1, the Court determined that the actual legal question stated in the Agreed Order was incorrect. After notifying the parties at a hearing and in an order that it was considering ruling on the issue of the sufficiency of the collateral description in Sunz' Security Agreement, as

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[29] *Agreed Order Granting Motion to Limit Scope of Sunz Insurance Company's Motion for Summary Judgment (Doc. 104)*, Doc. 111, p. 2 ("Agreed Order").

[30] The order (1) approved and adopted a settlement agreement between Sunz Insurance Company and Sunz Insurance Solutions, Harrison Sale McCloy Chartered, et al. and Greer Law Firm, and (2) entered judgment against Florida Department of Revenue, Okaloosa County Tax Collector, U.S. Capital Partners, Inc., Vensure Employer Services, Inc., and Centennial Bank. *Order Granting Agreed Motion for Entry of Judgment (Doc. 160) and Entering Judgment*, Doc. 163.

opposed to the UCC-1, the Court provided the parties an opportunity to brief that issue.[31] Sunz and the IRS submitted supplemental briefs.[32]

DISCUSSION

Summary of Sunz' and the IRS' Arguments

Sunz and the IRS agree that the BP Claim originated as a commercial tort claim. It is undisputed that no commercial tort claim is described as collateral in Sunz' Security Agreement. Sunz' position is that the BP Claim became a "right to payment" or "contract" before 2015, after (1) the Economic Class certification and BP Settlement Agreement became final, (2) Debtor did not "opt out" of the Economic Class, and (3) Debtor submitted all necessary claim forms to the GCCF and DHCC.

The IRS argues that the BP Claim was still a commercial tort claim when Debtor executed the Security Agreement in 2015. It argues further that even if the BP Claim converted from a commercial tort claim to a general intangible, including a "right to payment," it did so only after this Court approved Debtor's settlement of that claim and Debtor executed the

[31] Order Requiring Further Briefing, Doc. 142.
[32] *Plaintiff's Supplemental Brief in Support of Motion for Summary Judgment*, Doc. 152; *United States' Response to Plaintiff's Brief*, Doc. 159.

Release in 2018. For those reasons, the IRS claims that the tax liens recorded in 2017 give it priority over Sunz as to the BP Claim.

Summary Judgment Standard

Summary judgment is governed by Fed. R. Civ. P. 56, applicable by Fed. R. Bankr. P. 7056. The Court may grant summary judgment where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[33] "The moving party has the burden of establishing the right to summary judgment."[34] "Conclusory allegations by either party, without specific supporting facts, have no probative value."[35] "Facts are material if they 'might affect the outcome of the suit under the governing law' and disputes over material facts are genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'"[36] The facts "must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to these facts."[37] On cross-motions for summary judgment, the Court must determine whether either party is entitled to a judgment in its favor as a matter

[33] Fed. R. Civ. P. 56(c).
[34] *Bender v. James (In re Hintze)*, 525 B.R. 780, 784 (Bankr. N.D. Fla. 2015).
[35] *Id.*
[36] *Id.*
[37] *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting Fed. R. Civ. P. 56(c)).

of law, viewing the evidence and inferences in the light most favorable to the nonmoving party.[38]

Sunz' Security Interest Did Not Attach to the BP Claim

Florida's Uniform Commercial Code governs attachment of security interests.[39] Fla. Stat. §§ 679.2031(1) and (2) provide, in pertinent part:

> (1) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral . . . .
> (2) Except as otherwise provided . . . a security interest is enforceable against the debtor and third parties with respect to the collateral only if:
> (a) Value has been given;
> (b) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
> (c) One of the following conditions is met:
> 1. *The debtor has authenticated a security agreement that provides a description of the collateral* . . . .[40]

Section 679.1081 of Florida's UCC governs the sufficiency of descriptions of collateral and provides, in pertinent part:

> (1) *[A] description of personal* or real *property is sufficient, whether or not it is specific, if it reasonably identifies what is described.*
> (2) Except as otherwise provided . . . a description of collateral reasonably identifies the collateral if it identifies the collateral by:
> (a) Specific listing;

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[38] *Chavez v. Mercantil Commercebank, N.A.*, 701 F.3d 896, 899 (11th Cir. 2012); *Morris v. Wal-Mart Stores East, LP*, No. 1:19cv103-MW/GRJ, 2019 WL 7347180, at *1 (N.D. Fla. Nov. 12, 2019).

[39] Fla. Stat. § 679.2031 (2020). Florida's UCC is codified in chapters 668 through 680 of the Florida Statutes and will be referred to herein as "Florida's UCC."

[40] *Id.* § 679.2031(1)–(2) (emphasis added).

> (b) Category;
> (c) . . . a type of collateral defined in the Uniform Commercial Code;
> . . . .[41]

Section 679.1081(3) of Florida's UCC provides that "[a] description of collateral as 'all the debtor's assets' or 'all the debtor's personal property' *or using words of similar import* does not reasonably identify the collateral for purposes of the security agreement."[42]

Florida's UCC § 679.1081(5)(a) imposes heightened identification requirements for commercial tort claims: "a description only by type of collateral defined in this chapter is an insufficient description of: (a) A commercial tort claim . . . ."[43] As relevant here, § 679.1021(m) of Florida's UCC defines a commercial tort claim as "a claim arising in tort with respect to which: the claimant is an organization . . . ."[44]

Courts, including the court that approved the Deepwater Horizon Oil Spill claims and settlement procedures, have characterized the Deepwater Horizon Oil Spill as a "mass tort action" and the payments made

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[41] *Id.* § 679.1081(1)–(2) (emphasis added).
[42] *Id.* § 679.1081(3) (emphasis added).
[43] *Id.* § 679.1081(5)(a), cmt. 5; *see also Bayer Cropscience v. Stearns Bank Nat. Ass'n*, 837 F.3d 911, 916 (8th Cir. 2016) (holding that under a substantively identical provision in Texas' UCC, "debtor's commercial tort claim" was an insufficient collateral description. Tex. Bus. & Com. Code. Ann. § 9.108(e) and cmt. 5).
[44] Fla. Stat. § 679.1021(m).

and proceeds of the BP Settlement Agreement as settlement of a "tort claim" or "environmental tort claim."[45] In *In re Smith*, the issue was whether the debtor's BP claim was a commercial tort claim, and therefore § 541 property of the estate.[46] The debtor asserted that the BP claim was earnings from services, and therefore exempt; the Trustee's position was that the "BP claim is a pre-petition commercial tort claim that accrued on or about April 10, 2010 at the time of the BP oil spill and, as such, is a §541 asset of the bankruptcy estate."[47] In ruling for the Trustee, Bankruptcy Judge Michael Williamson wrote:

> [T]he totality of the [BP] settlement agreement reflects that the proposed settlement payment is likewise being given to settle a tort claim. For starters, the settlement program was created as a part of a settlement of a class action lawsuit seeking damages for economic damages caused by the Deepwater Horizon oil spill. Moreover, as in *Powers*, the proposed settlement here specifically conditions payment of the $32,370.33 on the Debtor executing a release.[48]

In re Smith and other authority supports a ruling that the BP Claim

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[45] *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010*, 910 F. Supp. 2d at 914; *In re Stewart,* 583 B.R. 775, 780 (Bankr. W.D. Okla. 2018), *rev'd on other grounds,* 970 F.3d 1255 (10th Cir. 2020); *In re Smith*, 8:10-bk-18731-MGW, 2017 WL 978995, at *3 (Bankr. M.D. Fla. Mar. 9, 2017); *Colbert v. First NBC Bank,* No. 13–3043, 2014 WL 1329834 (E.D. La. Mar. 31, 2014).

[46] *In re Smith*, 2017 WL 978995, at *1.

[47] *Trustee's Reply to Debtor, Jacquelyn E. Smith's Supplemental Response to Motion to Approve Compromise of Controversy or Settlement Agreement* at ¶ 2, *In re Smith*, No. 8:10-bk-18731-MGW (Bankr. M.D. Fla. Sept. 29, 2016), Doc. 61.

[48] *In re Smith*, 2017 WL 978995, at *3 (citing *In re Powers*, 98 B.R. 577 (Bankr. M.D. Fla. 1989)).

at issue here is a commercial tort claim, as defined in Florida's UCC; it arose from the same oil spill and the money came from the same economic and property settlement program (i.e., the BP Settlement Agreement) as the debtor's claim in *In re Smith*.

The Court tends to agree with the IRS that the BP Claim remained a commercial tort claim until Debtor settled it postpetition with Court approval and executed and delivered the Release. Sunz has not cited, nor has this Court located, a case in which a court has categorized a claim arising out of the Deepwater Horizon Oil Spill as anything other than a commercial tort claim. Further, a fact not mentioned by either party is that the BP Settlement Agreement itself prohibits parties, like Debtor, from pledging interests in BP claims to creditors and states that "[a]ny such assignment is invalid."[49]

To salvage its security interest in the BP Claim, Sunz asserts that the BP Claim became a general intangible, in the form of a contractual obligation to pay, when the BP Settlement Agreement became final after exhaustion of all appeals in 2014. Had Sunz listed general intangibles, a

[49] *See* Deepwater Horizon Claims Center, http://www.deepwaterhorizoneconomicsettlement.com/ (click "FAQs" in the menu bar; click "VIII. Third Party Claims" under the search bar) (last updated July 14, 2014) (last visited March 24, 2021) (citing to Section 1.1.2.1 of Exhibit 21 to the BP Settlement Agreement).

right to payment, or contract rights as collateral, this position would have some legal support. As one comment to Florida's UCC explains: "once a claim arising in tort has settled and reduced to a contractual obligation to pay, *the right to payment becomes a payment intangible* and ceases to be a claim arising in tort."[50] A payment intangible is a subset of, and included in, Florida's UCC definition of a general intangible.[51] But nowhere in the Security Agreement does "general intangible," "payment intangible," or "right to payment" appear.

Sunz contends that the following language suffices to cover general intangibles: "all tangible and intangible property which is or may be used in the business of Pledgors." The IRS and the Court disagree. In *Cheniere Energy, Inc. v. Parallax Enterprises LLC* one of the issues before the court was whether the collateral description, "all other . . . intangible property," reasonably identified the debtor's equity interest in its subsidiary, a general intangible.[52] The *Cheniere Energy* court determined that "intangible

[50] Fla. Stat. § 679.1091 cmt. 15 (emphasis added).
[51] *Id.* § 679.1021(pp) ("General intangible means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims . . . *The term includes payment intangibles* and software.") (emphasis added); *id.* § 679.1021(iii) ("Payment intangible *means a general intangible* under which the account debtor's principle obligation is a monetary obligation.") (emphasis added).
[52] *Cheniere Energy, Inc. v. Parallax Enters. LLC,* 585 S.W.3d 70, 79 (Tex. App.—Houston [14th Dist.] 2019) (assessing a substantively identical provision under Texas' UCC, Tex. Bus. & Com. Code. Ann. § 9.102(a)(42), to Florida's UCC, Fla. Stat. § 679.1021(pp)).

property" was "broader than 'general intangibles.'"[53] The court ruled against the creditor claiming the security interest, noting that had the creditor included the term "general intangible" in its security agreement, the collateral description would have been sufficient under the UCC to attach to the debtor's equity interest in its subsidiary.[54] In response to the creditor's argument that its collateral description was sufficient because it "encompassed" the collateral, the court stated:

> [T]he question is whether the description reasonably identifies the collateral, not whether the description "encompasses" the collateral. If it were sufficient to say that the description *encompasses* the collateral at issue, then the UCC would not state that super-generic descriptions such as "all the debtor's assets" or "all the debtor's personal property"—both of which encompass all general intangibles—do not reasonably identify collateral.[55]

Like in *Cheniere Energy*, had Sunz' Security Agreement included "general intangibles," and had the BP Claim been a right to payment, a subset of general intangibles under Florida's UCC, Sunz' security interest would have attached.[56] Simply tacking the vague phrase "which is or may

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[53] *Id.* (assessing a substantively identical provision under Texas' UCC, Tex. Bus. & Com. Code. Ann. § 9.108(e)(1), to Florida's UCC, Fla. Stat. § 679.1081(5)(a)).
[54] *Id.*
[55] *Id.* at 80 (emphasis in original).
[56] *Id.* at 79; *see also In re Hintze*, 525 B.R. at 785.

be used in the business of Pledgors" to "all tangible and intangible property" does not add specificity or clarity that would reasonably identify the BP Claim as collateral.[57]

Like the creditor in *Cheniere Energy*, Sunz attempts to rely on *In re ProvideRx of Grapevine.*[58] *ProvideRx* is factually distinguishable. There, rather than "general intangibles," the security agreement listed "IP Assets."[59] The court found that the documents clearly showed "the parties' objective intent that [the debtor's] IP Assets serve as collateral for the loan."[60] The court determined that although it would have been "preferable for the parties to use the defined term 'general intangibles'" their failure to do so was not fatal; "IP Assets" sufficiently described all of the debtor's intellectual property such that the lender's security interest attached.[61] The court in *ProvideRX* reasoned that because "general intangi-

[57] *Green Auto., LP v. ATN Mgmt. Co., LLC.*, No. CIV-18-28-R, 2018 WL 4374204, at *6 (W.D. Okla. Sept. 13, 2018) (finding that the phrase "Customer's assets related to the business" was an insufficient description of collateral as to satisfy the requirements of attachment) (citing *In re Hintze*, 525 B.R. at 785).
[58] *CERx Pharmacy Partners, LP v. Provider Meds, LP (In re ProvideRX of Grapevine)*, 507 B.R. 132 (Bankr. N.D. Tex. 2014); *see Cheniere Energy*, 585 S.W.3d at 79.
[59] *In re ProvideRX*, 507 B.R. at 162.
[60] *Id.* at 160.
[61] *Id.* at 162 (assessing substantively identical provision under Texas' UCC, Tex. Bus. & Com. Code. Ann. § 9.108 cmt. 2, to Florida's UCC, Fla. Stat. § 679.1081 cmt. 2).

bles" would have be statutorily sufficient, the subset of general intangibles—"referred to as intellectual property assets (IP assets)"—was also sufficient to reasonably identify the collateral.[62]

The distinction between the security agreement in *ProvideRX* and Sunz' Security Agreement is that Sunz used neither the UCC specific "general intangibles" nor a recognized subset. Instead, Sunz' Security Agreement used the overbroad, super-generic description, "all tangible and intangible property."

Sunz' next argument—that the phrase "existing contracts and policies" reasonably identified the BP Claim—is unconvincing. The first case Sunz cites in support of this argument is *In re Chorney.* In *Chorney*, the Chapter 7 debtor settled a personal injury claim prepetition for $100,000.00 payable over time, funded with an annuity ("Structured Settlement"), and borrowed about $12,000.00 from a bank.[63] The debtor signed a security agreement that described the collateral as:

> [A]ll right, title and interest of Borrower . . . in, to and under any and all contract rights . . . now existing or hereinafter acquired including, without limitation, any rights to cash payments due to Borrower and all right, title and interest of Borrower . . . to receive any monies under or pursuant to or on

[62] *Id.*
[63] *Lustig v. Peachtree Settlement Funding, LLC (In re Chorney)*, 277 B.R. 477, 478 (Bankr. W.D. N.Y. 2002).

> account of or related to any and all contract rights . . . and any interest on the proceeds of all of the above composing or comprising all or any portion of any and all contract rights or other personal property . . . .[64]

The Chapter 7 Trustee filed an adversary proceeding claiming, in part, that the security interest in the Structured Settlement had not attached and was not perfected.[65] The bankruptcy court first determined that the debtor's personal injury tort claim was "eliminated and replaced by" the obligation to make payments under the Structured Settlement.[66] The court then determined that the security agreement's language clearly granted a security interest in the debtor's Structured Settlement.[67]

The distinction between the instant case and *In re Chorney* is clear. The court in *Chorney* found that the bank intended to take, and the debtor intended to give, a security interest in the Structured Settlement, which was reasonably identified in the security agreement.[68] By contrast, the

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[64] *Id.* at 479–80 n.2.
[65] *Id.* at 479.
[66] *Id.* at 485, 487–89 (applying New York's former Article 9 provision which in relevant part is substantively identical to Fla. Stat. § 679.1091 cmt. 15)
[67] *Id.* at 487–89 (citing New York's former Article 9 provision and Comment 15, which in relevant part is substantively identical to Fla. Stat. § 679.1091 cmt. 15).
[68] *Id.* at 488. The court's discussion of the issue suggests that the Structured Settlement was the debtor's only contract or payment receivable. The court reached this ruling by focusing on the section of New York's Article 9 comparable to Fla. Stat. § 679.1081(1).

collateral description in Sunz' Security Agreement gives absolutely no indication that Debtor intended to pledge or Sunz intended to obtain a security interest in the BP Claim, which is not reasonably identified.[69]

Sunz also relies on *Jimani Corp. v. S.L.T. Warehouse Co.*[70] There, a Florida court held that the pledge of "all accounts receivable and all contract rights" was sufficient to grant the bank a security interest in a specific contract between the debtor and a third party.[71] By contrast, Sunz' Security Agreement does not contain the words "accounts receivable" or "contract rights."

Another case on which Sunz relies, although for what purpose is a mystery to this Court, is *Brown v. Indiana National Bank*.[72] In *Brown*, hockey player Andrew Brown signed a contract to play for the Indianapolis Racers.[73] The Racers borrowed money and pledged assets as security for the loan, including "all player contracts . . . ."[74] After borrowing more money, the Racers defaulted; its bank then planned to take possession of

[69] Nothing before this Court suggests or implies that Sunz even knew Debtor had a BP Claim in 2015 when it financed Debtor's worker's compensation insurance premiums.
[70] *Jimani Corp. v. S.L.T. Warehouse Co.*, 409 So.2d 496 (Fla. 1st DCA 1982).
[71] *Id.* at 503.
[72] *Brown v. Ind. Nat'l Bank*, 476 N.E.2d 888 (Ind. App. 1985).
[73] *Id.* at 890. The Indianapolis Racers' franchise was later sold to Indianapolis Racers, Ltd. *Id.*
[74] *Id.*

the collateral, including Brown's contract, and sell it at a private sale.[75] Brown sued the bank for fraud and breach of duty of good faith and fair dealing, claiming the bank breached a duty to notify him of its security interest in his contract.[76] No party in *Brown* disputed that the bank had a perfected security interest in all player contracts, including Brown's; perfection of the bank's security interest was not an issue. The reason is readily apparent: the security agreement in *Brown* specifically listed "contract rights," "general intangibles," and "all player contracts now existing or hereafter arising . . . ."[77] This Court finds nothing whatsoever in *Brown* to support any of Sunz' arguments that its Security Agreement clearly identified the BP Claim.

Sunz' Security Agreement mentions "contract" only twice: in the phrases "contract proposals and bidding information" and "existing contracts and policies." Assuming, arguendo, that the BP Claim was a contract in 2015 rather than a commercial tort claim, when read in context neither of those phrases save the day for Sunz.

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[75] *Id.*
[76] *Id.*
[77] *Id.* at 894.

Under Florida law, the parties' intent governs contract interpretation and construction.[78] To determine the parties' intent, a court should consider the contract's language, subject matter, and purpose.[79] In interpreting contracts, courts "are not to isolate a single term or group of words and read that part in isolation; the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose."[80] The canon of *noscitur a sociis* means "it is known by its associates;" words that are listed together should be given similar meanings.[81] That canon, applied to the facts here, reinforces the conclusion that the collateral description in the Security Agreement was not intended to include the BP Claim.

In the Case Management Summary filed shortly after its Chapter 11 petition, Debtor describes the history and nature of its business, including during 2015:

> PMI operated as a PEO (Professional Employer Organization) to employ individuals who worked for various companies, leasing the employees to the companies. In exchange for management fee [sic], PMI would handle all of the state and federal

[78] *Sims v. Wells Fargo Bank N.A. (In re Sims)*, 781 F. App'x 884, 887 (11th Cir. 2019) (citing *Horizons A Far, LLC v. Plaza N 15, LLC*, 114 So.3d 992, 994 (Fla. 5th DCA 2012)).
[79] *American Home Assur. Co. v. Larkin General Hosp., Ltd.*, 593 So.2d 195, 197 (Fla. 1992).
[80] *In re Sims*, 781 F. App'x at 887 (quoting *Horizons A Far*, 114 So.3d at 994).
[81] *Beach Towing Servs. v. Sunset Land*, 278 So.3d 857, 861 (Fla. 3d DCA 2019) (citing Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (1st ed. 2012)).

> payroll tax reporting requirements, payment of taxes, employee benefits, workers compensation and other matters.
>
> . . . .
>
> . . . Debtor . . . suffered yet another significant hardship in 2014 and 2015 in the form of particularly high workers compensation losses, over $20 million in total workers compensation losses during those two years, during a time when the Debtor was self insuring [sic] for workers compensation.
>
> Thereafter, the Debtor entered into negotiations with Suns [sic] Insurance to take over its workers compensation insurance responsibilities, ...[82]

The obligations covered by Sunz' Security Agreement are "[a]ll debts, obligations, liabilities, and agreements . . . arising out of or related to the Program Agreement and *any policies of insurance* issued thereunder . . . ."[83] The "Collateral" described in the Security Agreement includes:

> [T]he customer lists, including renewal policy information, related records and compilations of information; the identity, lists or descriptions of any new or potential customers, referral sources or organizations; marketing programs; financial information; . . . business plans; training and operations methods and manuals; software programs; reports; premium structures . . . .[84]

[82] *Debtor's Case Management Summary* at 1–2, *In re Payroll Mgmt., Inc.*, No. 18-30298-KKS (Bankr. N.D. Fla. May 18, 2018), Doc. 47.
[83] Security Agreement, Doc. 74, Ex. J-2, at 13 (emphasis added).
[84] *Id.*

The collateral description and security language, when read in context with Debtor's description of its business, was obviously designed to encompass *insurance* contracts, contracts for leasing employees to Pledgors' customers, *insurance* policies, and other assets customarily used by Pledgors, including Debtor, in their employee leasing businesses. Nothing in the collateral description even hints at an intent to include an unrelated asset, the BP Claim. In fact, Debtor could not have used the BP Claim in its business in 2015 because that claim had not yet been settled or liquidated.

If words that are listed together are to be given similar meanings, it is difficult, if not impossible, for the Court to logically conclude that Sunz and Debtor intended to include the BP Claim within "contract proposals and bidding information" or "existing contracts and policies."

The IRS Has a Valid, Enforceable Tax Lien on the BP Claim

The Agreed Order prescribes that the Court determine the "language and scope of the tax liens" filed by the IRS in 2017.[85] Federal law governs all aspects of federal tax liens, such as attachment and priority.[86] Pursuant to 26 U.S.C. § 6321, "a tax lien shall arise upon 'all property and

[85] Agreed Order, Doc. 111, p. 2.
[86] *Atlantic States Construction, Inc. v. Hand*, 892 F.2d 1530, 1534 (11th Cir. 1990).

rights to property' of a taxpayer neglecting to pay taxes owed."[87] This lien arises at the time assessment is made and attaches to property acquired after the tax lien arises.[88] To have an enforceable tax lien against other secured parties, the United States must file a notice of tax lien in the public records.[89]

If the IRS lien attached to the BP Claim beginning with the first tax assessment in 2013 and was perfected as to Sunz and other third parties in 2017, then the IRS lien followed the BP Claim into the Chapter 11 estate and attached to the proceeds. On the other hand, despite the all-encompassing language in the statutes cited by the IRS, if IRS liens do not attach to commercial tort claims, then neither the IRS nor Sunz have a lien or perfected security interest on the BP Claim. The question, then, is whether IRS tax liens attach to commercial tort claims.

Case law supports the IRS' assertion that its tax liens attached to the BP Claim, even if it remained a commercial tort claim. In *U.S. v. Hubbell*, the Fifth Circuit Court of Appeals held that an IRS tax lien was superior to a later assignment of an interest in a tort claim:

> [Plaintiff's] claim . . . was a chose in action; but the tax lien

[87] *In re Haas*, 31 F.3d 1081, 1084 (11th Cir. 1994) (quoting 26 U.S.C. § 6321).
[88] *Id.* (citing 26 U.S.C. § 6322)
[89] *Id.* (citing 26 U.S.C. § 6323).

> attached when the claim came into being (or as soon thereafter as the tax liens were perfected . . .). It must follow, therefore, that whatever rights [the creditors] took under the assignment were taken subject to the tax lien. . . .
>
> The real issue in this case, the unprecedented one, is whether the [IRS] lien attaches to an unliquidated claim sounding in tort. Neither party cites us to a case directly in point, and we have found none. We see no reason, however, why a tort claim is not "property" or "rights to property," just as, e.g., any unliquidated contract claim is so considered.[90]

Other courts agree with the conclusion reached in *Hubbell.*[91]

CONCLUSION

The burden of proving that an item of property is subject to a security interest is on the party asserting the interest.[92] An enforceable security interest is created only if all elements of attachment under § 679.2031 are present, including an authenticated security agreement with a description of collateral satisfying § 679.1081.[93] "If the description is explic-

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[90] *U.S. v. Hubbell,* 323 F.2d 197, 200 (5th Cir. 1963) (citing to 26 U.S.C. § 3670 (I.R.C. 1939)).
[91] *Marinelli v. Hills*, No. 10–CV–10561, 2010 WL 5441905, at *1 (D. Mass. Dec. 23, 2010) ("A federal tax lien attaches to any right to bring a cause of action (or its actual filing) belonging to a taxpayer. . . . The lien attaches to causes of action based on personal injury."); *Simon v. Playboy Elsinore Assocs.*, No. 90-6607, 1991 WL 71119, at *2 (E.D. Pa. Apr. 29, 1991) (an unliquidated and unsettled tort claim is a property right subjected to a federal tax lien).
[92] *Swope v. Com. Savings Bank (In re Gamma Center, Inc.)*, 489 B.R. 688, 693 (Bankr. N.D. Ohio 2013).
[93] *In re Hintze*, 525 B.R. at 785.

itly insufficient under § 679.1081, it is axiomatic that the description cannot meet the requirements of § 679.2031."[94] Because Sunz' Security Agreement does not reasonably identify the BP Claim as a commercial tort claim, general intangible, or proceeds of a contract, Sunz' security interest never attached.

The IRS tax lien attached when the first taxes were assessed in 2013, regardless of whether the BP Claim remained a commercial tort claim or had transformed into a payment receivable or contract. That lien was perfected as to Sunz and other third parties in 2017 when the IRS recorded its tax liens. Even though Sunz' Security Agreement was executed in 2015, because the collateral description did not encompass the BP Claim, the IRS lien prevails over the security interest claimed by Sunz.

For the reasons stated, it is

ORDERED:

1. *Plaintiff's Motion for Summary Judgment* (Doc. 74) is DENIED.
2. The IRS' cross-motion for summary judgment (*United States' Response to Plaintiff's Motion for Summary Judgment and United*

[94] *Id.* at 786.

States' Cross-Motion for Summary Judgment (Doc. 105)) is GRANTED.

3. The IRS lien on the BP Claim and proceeds of same is superior to the claim of Sunz.

4. The status hearing, pretrial conference, and trial scheduled to take place on April 20, 2021 and May 11, 2021 are CANCELED.

5. If any issues remain for determination in this Adversary Proceeding the parties may, within fourteen (14) days from the entry of this Order, file a motion requesting the Court to schedule a status hearing. Otherwise, the Clerk is directed to close this Adversary Proceeding once the instant Order becomes final.

DONE and ORDERED on March 25, 2021.

KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

Plaintiff's Counsel is directed to serve a copy of this Order on interested parties and file a proof of service within three (3) days of entry of this Order.